FRONTLINE SDN BHD

v.

DISNEY CAKE DECORATING & BAKERY

HIGH COURT SABAH & SARAWAK, KUCHING
MUHAMMAD KAMIL AWANG J
[CIVIL APPEAL NO: 11-05-98-II]
24 NOVEMBER 1998

CIVIL PROCEDURE: *Res judicata - Issue estoppel - Appellant obtained consent judgment for vacant possession of premises - Subsequently brought second action for arrears of rent and damages - Whether appellant estopped from bringing second action - Whether res judicata applies*

CIVIL PROCEDURE: *Estoppel - Res judicata and issue estoppel - Appellant obtained consent judgment for vacant possession of premises - Subsequently brought second action for arrears of rent and damages - Whether appellant estopped from bringing second action - Whether res judicata applies*

The appellant had earlier obtained a consent judgment for vacant possession of the premises it let out to the respondent. Apparently, the respondent had sublet the premises to an unknown person in breach of the tenancy agreement. Subsequently, the appellant brought another action ('the second action') against the respondent for damage caused to the premises and for arrears of rent. The Sessions Court, upholding the respondent's plea of *res judicata* taken as a preliminary objection, dismissed the second action. The appellant appealed.

Held:

[1] The consent judgment was in respect of vacant possession of the premises. The second action was a claim for damages and arrears of rent, both of which could only be ascertained after the appellant took vacant possession. Hence, *res judicata* did not apply and the appellant was not estopped from bringing the second action.

[Appeal allowed.]

Case(s) referred to:

Arnold & Ors v. National Westminister Bank PLC [1991] 3 All ER 41 ***(refd)***
Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 ***(refd)***
Bertam Consolidated Rubber Co Ltd v. Pemungut Hasil Tanah, Seberang Perai Utara, Butterworth [1989] 2 MLJ 178 ***(refd)***
Brunsden v. Humphrey [1884] 14 QBD 141 ***(refd)***
Carl-Zeiss Stiftung v. Rayner And Keeler, Ltd & Ors (No 2) [1966] 2 All ER 536 ***(refd)***
Fidelitas Shipping Co Ltd v. V/O Exportchleb [1966] 1 QB 630 ***(refd)***

Greenhalgh v. Mallard [1947] 2 All ER 255 ***(refd)***
Henderson v. Henderson [1843] 3 Hare 100 ***(refd)***
Heng Wooi Kim & Anor v. Bayview Properties Sdn Bhd [1997] 3 CLJ 711 ***(refd)***
In Re South American And Mexican Company Ex Parte Bank Of England [1895] 1 Ch 37 ***(refd)***
New Brunswich Railway Company v. British And French Trust Corporation Ltd [1939] AC 1 ***(refd)***
OCBC Bank (M) Bhd v. Kredin Sdn Bhd [1997] 2 CLJ 534 ***(refd)***
Seng Huat Hang Sdn Bhd & Ors v. Chee Seng & Co Sdn Bhd [1987] 1 MLJ 413 ***(refd)***
The Pacific Bank Berhad v. Chan Peng Leong [1998] 2 CLJ 440 ***(refd)***
Tuaine v. Wallis [1965] NZLR 82 ***(refd)***
Wee Bing Po v. Dayang Anak Ngipa [1974] 2 MLJ 56 ***(refd)***
Yat Tung Investment Co Ltd v. Dao Heng Bank Ltd & Anor [1975] AC 581 ***(refd)***

For the appellant - Robert Tang; M/s Tang & Partners
For the respondent - Leslie Chew; M/s Chew, Jugah, Wan Ullok & Co

Reported by Gan Peng Chiang

JUDGMENT

Muhammad Kamil Awang J:

By an agreement dated 12 March 1996 the appellant let out to the respondent the ground and the second floors of Lot 8952, s. 64 KTLD for a term of three years at RM1,200 per month. The respondent had, in breach of cl. 4(j) of the agreement, underlet the second floor to a person unknown. The appellant filed an action (first action) against the respondent for vacant possession of the second floor, and obtained a consent judgment dated 20 March 1997 for vacant possession thereof.

On 29 April 1997 the appellant brought a second action against the respondent for damage caused to the premises and for arrears of rent. At the hearing before the Sessions Court, the sole preliminary issue raised was whether the doctrine of *res judicata* applied in this case. It was held that *res judicata* was applicable. Hence, the appellant appealed.

The only issue for the decision of this court is whether the doctrine of *res judicata* is applicable in this case.

The appellant submitted that *res judicata* was not applicable as the issues in both actions were not the same. The facts in the present appeal were different. As such *res judicata* was not applicable and cited the following cases in support:

Brunsden v. Humphrey [1884] 14 QBD 141;

The Pacific Bank Berhad v. Chan Peng Leong [1998] 2 CLJ 440;

Tuaine v. Wallis [1965] NZLR 82;

Wee Bing Po v. Dayang Anak Ngipa [1974] 2 MLJ 56;

Heng Wooi Kim & Anor v. Bayview Properties Sdn Bhd [1997] 3 CLJ 711;

Yat Tung Investment Co Ltd v. Dao Heng Bank Ltd & Anor [1975] AC 581.

The respondent submitted that in the appellant's first action for the vacant possession of the second floor premise, the appellant could have brought at the same time a claim for arrears of rents and damages. By bringing this second action the respondent could be greatly prejudiced, and the respondent was twice vexed for the same cause of action. *Res judicata* was applicable in this case, and he cited the following cases in support:

Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783; [1995] 2 MLJ 189;

Henderson v. Henderson [1843] 3 Hare 100;

Greenhalgh v. Mallard [1947] 2 All ER 255;

OCBC Bank (M) Bhd v. Kredin Sdn Bhd [1997] 2 CLJ 534;

In Re South American And Mexican Company Ex Parte Bank Of England [1895] 1 Ch. 37.

The original doctrine of *res judicata* and the subsequent development of the principle of issue estoppel were succinctly dealt with by Lord Guest in *Carl-Zeiss Stiftung v. Rayner And Keeler, Ltd And Ors* (No. 2) [1966] 2 All ER 536 at p. 564 as follow:

> The doctrine of estoppel at per rem judicatam is reflected in two Latin maxims, (1) interest rei publicae ut sit finis litium and, (2) nemo debet bis vexare pro una et eadem causa. The former is a public policy and the latter is private justice. The rule of estoppel by *res judicata*, which is a rule of evidence, is that where a final decision has been pronounced by a judicial tribunal of competent jurisdiction over the parties to and the subject matter of the litigation, any party or privy to such litigation as against any other party or privy is estopped in any subsequent litigation from disputing or questioning such decision on the merits (*Spencer Bower On Res Judicata,* p3)

In *New Brunswich Railway Company v. British And French Trust Corporation Ltd* [1939] AC 1, Lord Maugham L.C. said this at pp. 19-20:

> The doctrine of estoppel is one founded on considerations of justice and good sense. If an issue has been distinctly raised and decided in an action, in which both parties are represented, it is unjust and unreasonable to permit the same issue to be litigated afresh between the same parties or persons claiming under them.

The principle governing *res judicata* and issue estoppel are further stated in this way by Lord Denning in *Fidelitas Shipping Co. Ltd. v. V/O Exportchleb* [1966] 1 QB 630 at p. 640:

> The law, as I understand it, is this: if one party brings an action against another for a particular cause and judgment is given upon it, there is a strict rule of law that he cannot bring another action against the same party for the same cause. Transit in rem judicatam: see *King v. Hoare* [1844] 13 M & W 494, 504. But within one cause of action, there may be several issues raised which are necessary for the determination of the whole case. The rule then is that, once an issue has been raised and distinctly determined between the parties, then, as a general rule, neither party can be allowed to fight that issue all over again.

The respondent submitted that the policy of *res judicata* is that it is in the public interest that there should be a finality in litigation. "The public policy of the law is that, it is in the public interest that there should be a finality in litigation - *interest rei publicae ut sit finis litium*. It is only just that no one ought to be vexed twice for the same cause of action - *nemo debet bis vexari pro eadem causa*. Both maxims are the rationales for the doctrine of *res judicata*, but the earlier maxim has the further elevated status of a question of public policy".

per Peh Swee Chin, FCJ in *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd (supra).*

In the instant case, the consent judgment obtained by the parties in the first action was in respect of the vacant possession of the second floor premises. In the second action, the appellant claimed for arrears of rent damages etc pertaining to the second floor, and arrears of rent and damages etc could be ascertained only when the vacant possession of the second floor was handed to the appellant. This second action forms a separate and distinct issue, though it may be brought in the same cause of action in the first action, this was not done.

The respondent argued that the appellant should have brought the issues in the first action and not raised them in the second action, and he relied on the case *OCBC Bank (M) Bhd v. Kredin Sdn Bhd (supra)* where it was held that it was an abuse of the process to raise matters which could and should have been litigated in earlier proceedings and that this principle is applicable to every point which properly belonged to the subject of litigation which the parties might have brought forward at the time.

In *Re South American And Mexican Company Ex Parte Bank Of England (Supra)* Vaughan Williams, J. said at p. 45:

> It has always been the law that a judgment by a consent or by default raises an estoppel just in the same way as a judgment after the Court has exercised a judicial discretion in the matter. The basis of the estoppel is that, when parties have once litigated a matter, it is in the interest of the estate that litigation should come to an end; and if they agree upon a result, or upon a verdict and judgment, as the case may be, an estoppel is raised as to all the matters in respect of which an estoppel would have been raised by judgment if the case had been fought out to the bitter end.

The point in issue in the first action was necessarily and with precision determined by the consent judgment. For convenience the consent judgment is reproduced below:

IN THE SESSIONS COURT AT KUCHING
IN THE STATE OF SARAWAK, MALAYSIA

SUMMONS
NO: 52-16-97(II)

BETWEEN

FRONTLINE SDN BHD
2nd Floor, Lot 7576
Jalan Kwong Lee Bank
93450 Kuching ... Plaintiff

AND

DISNEY CAKE DECORATING & BAKERY
Lot 8952, Ground and 2nd Floors
Off Jalan Sekama
93000 Kuching ... Defendant

JUDGMENT IN CHAMBERS

The 20th day of March, 1997

THE ACTION having this day been called on for hearing before Her Honour Madam Yew Jen Kie in the presence of Miss Marina Foo of Counsel for the Plaintiff and Miss Koh Yee Long of Counsel for the Defendant BY CONSENT IT IS THIS DAY ADJUDGED that the Defendant do deliver up to the Plaintiff possession of the 2nd Floor of the building situate at Jalan Sekama, Kuching on Lot 8952, Section 64, Kuching Town Land District and that costs of RM300.00 be given to the Plaintiff.

DATED THIS 29th day of April, 1997

(sgd)
...
Registrar

This Judgment is filed by Messrs Tang & Partners, Advocates of Lots 164-166 (2nd Floor), Jalan Song Thian Cheok, 93100 Kuching.

In *The Pacific Bank Bhd v. Chan Peng Leong (supra),* Gopal Sri Ram JCA held that "It is the essence, in cases of this nature, when the plea of *res judicata* is taken, to identify with precision the issue that was decided in the earlier proceedings, when it is contended operates as a bar to relitigation. The earlier judgment must necessarily and with precision determine the point in issue."

In *Henderson v. Henderson (supra)* Sir James Wigram said at p. 319:

> In trying this question I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contract, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

In *Bertam Consolidated Rubber Co Ltd v. Pemungut Hasil Tanah, Seberang Perai Utara, Butterworth* [1989] 2 MLJ 178, Edgar Joseph Jr. J. (as he then was) said at p. 184:

> There is another principle of *res judicata* which must not be forgotten and it is this: whenever it is shown that the party against whom the judicial decision is pronounced omitted to raise by pleadings, argument, evidence, or otherwise some question or issue or point which he could have raised by way of defence or support to his case, the adverse decision, though it contains no express

> declaration to that effect, is deemed to carry with it a particular adverse decision on the question, issue or point so omitted to be raised, just as much as if it had been expressly determined against him. It makes no difference that the question or issue is simply passed over through inadvertence, or is made the subject of express or implied admission.

Now we come to consider the private justice of the parties. In *Seng Huat Hang Sdn Bhd & Ors v. Chee Seng & Co Sdn Bhd* [1987] 1 MLJ 413 Edgar Joseph Jr (as he then was), said at p. 419:

> Also of importance is the fact that the plaintiff must always explain why the matters alleged could not have been brought forward in the original proceedings

In *Arnold & Ors v. National Westminister Bank PLC* [1991] 3 All ER 41 (HL) Lord Keith of Kinkel said:

> The underlying principles on which estoppel was based, *ie* public policy and justice, had greater force in the cause of action estoppel, where the subject matter of the two proceedings was identical, than in issue estoppel, where the subject matter was different, and there was an exception to the rule of issue estoppel in the special circumstances which obtained when there had become available to a party further material which was relevant to the correct determination of the point involved in the earlier proceedings but which could not by reasonable diligence have been adduced in those proceedings, regardless of whether that point had then been specifically raised and decided. Depending on the circumstances of each case the further relevant material which a party would be permitted to bring forward in the later proceedings was not confined to the matters of fact but could include a change in the law.

In my view, the claim in the second action in respect of arrears of rent, electricity and water charges and repairs to the second floor, is clearly not included in the consent judgment in the first action. Therefore, it is clear that *res judicata* is not applicable in this case. In the circimstances I would allow the appeal with costs.